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THE LEGALITY OF THE BLOCKADES INSTITUTED BY NAPOLEON'S DECREES, AND THE BRITISH ORDERS IN COUNCIL, 1806-1813

No exhaustive study has, as yet, been made of the Napoleonic era with a view of determining the exact legal status of the blockades established by the British orders in council and the French decrees. It is the purpose of this work to point out the more salient features embodied in the principles of blockade during this period as set forth and laid down by the statesmen of the United States, Great Britain and France, together with their relations to the principles of international law. With this end in view, the treaties, conventions and diplomatic intercourse between the United States and these two foreign countries have been carefully studied. The opinions of statesmen and official legal counsel, as well as the diplomatic correspondence and the decisions of the admiralty courts must be accepted as, in a large measure, establishing the international principles upon which the legality of the various acts may be determined. Court decisions during this period, however, are too much influenced by expediency, made necessary by the demands of the times, to be unconditionally accepted as the last word on the legality of the points in question; but they will nevertheless be freely used.

But before entering into the discussion of the blockade after 1806 it will be necessary, first, to establish the generally accepted definition of what constituted a blockade prior to that time.

I. THE CONCEPTION OF BLOCKADE PRIOR TO 1806

The Russian proclamation of 1780 laid down the definition of a blockade as follows: "That the denomination of a blockaded port is to be given only to one which has the enemy vessels stationed sufficiently near to cause an evident danger to the attempt to enter."¹ This prin-

¹ Wheaton, *International Law*, 297-298.

ciple seems also to have been adopted quite completely by the British. In 1798, Sir William Scott, of the High Court of Admiralty, in reference to the proclamation of January 1, 1794, placing the French West Indies under blockade, said,

The Lords of Appeal have determined that such a proclamation was not itself sufficient to constitute a legal blockade: it is clear, indeed, that it could not in reason be sufficient to produce the effect, which the captors [of the *Betsey*] erroneously ascribed to it; but from the misapplication of these phrases in one instance, I learn, that we must not give too much weight to the use of them on this occasion; and from the generality of these expressions, I think we must not infer, that this was not that actual blockade which the law is now distinctly understood to require.²

In the same case he says,

On the question of blockade three things must be proved: 1st, the existence of an actual blockade; 2nd, the knowledge of the party; and 3rd, some act of violation, either by going in, or by coming out with a cargo laden after the commencement of the blockade.³

Again, in 1804 the prize court laid down the rule that, to constitute a blockade, notice to shut up the port should be given, and special notice of blockade must be made to vessels in the neighborhood of the port to warn them off, and that in addition, a force sufficient to enforce the blockade must be stationed near enough to keep all vessels from entering.⁴

These cases point to the acceptance of the principles that blockades must be generally as well as specially notified, and that paper blockades are invalid.

This rule seems to have substantially coincided with that of the French at this period,⁵ and, with the exception of the parts relating to notification, was the definition given in the treaty between Russia and Great Britain in 1801. Article IV of this treaty reads:

² The *Betsey*, 1 C. Rob. 92a; Scott's Cases, 798.

³ *Ibid.*

⁴ The *Nancy*, 1 Acton, 57; Scott's Cases, 817. This was, however, a blockade instituted by the commander of the fleet.

⁵ W. E. Hall, A Treatise on International Law, 719.

In order to determine what characterizes a blockaded port, that denomination is given only to a port where there is, by disposition of the Power which attacks it with ships stationary or sufficiently near, an evident danger in entering.⁶

That this was also the view of American statesmen as to a valid blockade is shown by the diplomatic correspondence between the United States and Great Britain referring to the proposed treaty of 1806.⁷ But here the discussion centered more upon the question of notification, as this point was not completely covered by the Russian treaty.

In 1799 Sir William Scott decided the case of the *Neptunus*, in which he held that

The effect of a notification to any foreign government would clearly be to include all the individuals of that nation; it would be the most nugatory thing in the world, if individuals were allowed to plead their ignorance of it; it is the duty of the foreign governments to communicate the information to their subjects, whose interests they are bound to protect.⁸

On first thought it would seem that these decisions are contradictory; but on closer examination it is found that in the case of the *Betsey* the declaration of blockade was made by the commander of the fleet and was not properly notified to foreign governments; while in the latter decision, that of the *Neptunus*, the same justice states the rule as given above. In this case he does, however, recognize that American vessels

⁶ Am. State Papers, For. Rel. VIII, 81. Also in a letter from Mr. Monroe to Mr. Madison, Feb. 12, 1806. The former stated that Mr. Fox "intimated that he had been accused of being too friendly with Americans, and when I spoke of the treaty with Russia, he observed that he had thought the arrangement made by it was a good one."

⁷ *Ibid.*, For. Rel. VIII, 214.

Mr. Monroe to Mr. Fox, Feb. 25, 1806.

"In respect to neutral rights, it is proposed to adopt between the governments, in such cases as were more liable of abuse, certain principles or rules of conduct which Great Britain had already assented to in her treaty with Russia in 1801. As those Powers had entered into the treaty for the express purpose of defining the law of nations in the cases to which it applied, and Great Britain had adopted its conditions afterwards in separate conventions with Denmark and Sweden, with the same view, it was concluded, that her government would not hesitate to admit its doctrine, or to observe its injunctions with other Powers."

⁸ 2 C. Rob. 110; Scott's Cases, 796.

might have been a long time enroute, and in a position where notification by the government would be quite difficult or next to impossible, and holds that in such cases special notice is necessary. Thus the seeming contradiction of principles is in fact the application of different principles to two distinct cases.

The principle that notification to foreign governments through official channels constituted also notification to their individual merchant vessels became the stumbling block during the negotiations for the rejected treaty of 1806. American statesmen contended that notification of an existing blockade to ministers or representatives of foreign states is not sufficient, and also objected strongly that a blockade should be considered to be still in legal force until rescinded by the instituting government even though the force applied to it was neglecting to enforce it. They also insisted upon direct special notification to American vessels because of the great distance separating the United States from Europe. The treaty as signed by the American agents failed completely on these points. The British agents were also averse to incorporating the article of the Russian treaty into that with the United States, or even to give any concise definition, whatever, of what constituted a blockade. Mr. Madison, in his letter to the American ministers at London said,

The British doctrine of blockades, exemplified by practice, is so different from that of all other nations, as well as from the reason and nature of that operation of war. The mode of notifying a blockade by proclamation and diplomatic communication, of what, in fact, has been done, is more particularly the evil which is to be corrected. Against these nominal blockades the article does not sufficiently close the door.⁹

In July, 1807, the American ministers, Monroe and Pinckney, proposed to George Canning to incorporate the article of the Russian treaty *verbatim* into the treaty, but this the latter refused to do.¹⁰ In all probability the trend of affairs in Europe influenced the British not to compromise themselves on this point, and caused the Americans to seek so assiduously some acceptable settlement of the difference.

One other point brought out in 1805 must, however, not be omitted. This occurred in connection with the blockade of Cadiz, notified April 25,

⁹ Am. State Papers, For. Rel. III, 170.

¹⁰ *Ibid.*, 195.

1805, after having existed as a *de facto* blockade for some time previous to that date. After the declaration the Spanish vessel *Christina Margaretha* was seized in the British channel by a vessel not of the blockading force, although the prize had left the blockaded port before the official notification. In his opinion, Justice Scott said,

If it is pretended that the seizure was under the notification of the 25th of April, which had intervened before the capture, it would have been prudent to have applied it only to such ships as might be supposed to have received notice of it.¹¹

Out of this seeming conflict of opinion it is very difficult to arrive at the exact status of the rule of blockade. The weight of the opinions would, however, seem to point to the following facts: (1) that a blockade in order to be legal must have sufficient force applied to it to make it dangerous to enter or leave the port; (2) that the Americans demanded direct notification to vessels, while the British held that official notification to foreign governments was sufficient, but allowed a reasonable time in case of vessels at sea which could not be notified by the government before declaring them to be lawful prize.

The French view of legal blockade will be brought out more fully later. Suffice it to say at present that it was somewhat more strict than even the American view.

II. THE NAPOLEONIC BLOCKADES

In order to understand thoroughly the conditions as they existed between 1806 and 1812, it is necessary to recount briefly the principles laid down by the various British orders in council and French decrees.

On May 16, 1806, the orders in council instituting the first blockade of this interesting series were issued. They in substance declared a blockade of the European coast from Brest to the Elbe, but, through a secret understanding with Mr. Fox, it was not to be enforced against Americans except between the Seine and Ostend. The rest of the coast was thus left open to neutral vessels, but only in so far as they were not laden in an enemy port, carried enemy goods, or came directly from an

¹¹ 6 Robinson's Admiralty Reports, 64.

enemy port. The unofficial understanding was acquiesced in chiefly as a favor to Americans, whom Fox strongly favored. It was, nevertheless, a harbinger of evil for the United States, and the government made strenuous and untiring efforts to have the matter definitely adjusted by treaty, the negotiation of which, as before stated, was entrusted to J. Monroe and Wm. Pinckney. The treaty as finally signed by the two Americans, December 31, 1806, was notoriously inadequate in meeting the demands of their government and was not even considered. Further negotiations which took place over the controverted points were soon brought to a close by the decrees of Napoleon, the first of which, the Berlin decree, will now be considered.

The Berlin decree was issued November 21, 1806, as a measure of retaliation for Fox's blockade, the partial enforcement of which Napoleon preferred to overlook, disdaining to receive his supplies through the concessions of his enemies. Among the abuses of international law perpetrated by Great Britain and calling for reprisals, as set forth in this decree, those bearing on blockade play an important part. England is accused of blockading unfortified places, of declaring blockades without ships enough to enforce them and others which she would be utterly unable to enforce, and of seeking to gain commercial advantages over other states through the abuse of a war measure.¹²

From the above note may be derived some of the principles of blockade as understood by the French at this period. The rules there laid down were narrowed still more when France claimed to adhere to the

¹² Edwards' Admiralty Reports, Appendix to Pt. I, viii.

The statement of the abuses referring to blockade are:

"4. That she extends the right of blockade to commercial unfortified towns, and to ports, harbors, and mouths of rivers, which, according to the principles and practices of civilized nations [as interpreted by France], is only applicable to fortified places.

"That she declares places in a state of blockade before which she has not a ship of war, though no place can be considered in a state of blockade unless it is so invested that approach cannot be attempted without imminent danger.

"That she even declares places in a state of blockade, which, with all her forces united, she is incapable of blockading, namely, whole coasts and empires.

"5. That this monstrous abuse of the right of blockade has no other object than to obstruct the communication of nations with each other, and to raise the trade and industry of England upon the ruin of the trade and industry of the nations of the Continent."

rules of the Peace of Utrecht. In 1809 Count Champagne wrote to General Armstrong,

The right, or rather the pretension of blockading, by a proclamation, rivers and coasts, is as monstrous (*revoltante*) as it is absurd. A right cannot be derived from the will or caprice of one of the interested parties, but ought to be derived from the nature of things themselves. A place is not truly blockaded, until it is invested by land and by sea; it is blockaded to prevent it from receiving the succors which might retard its surrender. It is only then that the right of preventing neutral vessels from entering it exists; for the place so attacked is in danger of being taken, and the dominion of it is doubtful, and contested by the master of the town and him who besieges it. Hence the right of preventing even neutrals from having access to it.¹³

In how far this view was affected by the general military status of the day, it is difficult to say. One thing is evident, that should such rules have been applied to blockades the advantage would have been entirely on the side of the French and neutrals. It is difficult to conceive that Napoleon would have been so solicitous of the welfare of neutrals had it not, at the same time, been the most advantageous course for France. This principle if put in force would have made it utterly impossible for a nation having control of the sea to enforce a blockade without at the same time having control of the territory of the enemy.

It has ever been the custom among nations to make reprisals against an enemy when the latter violates any rule of international law. This is the principle upon which Napoleon justified his decrees and Great Britain her orders in council. The injury and discomfiture which such an act brings upon neutrals is generally not given much consideration; but in this case each by shifting the blame upon the other tended, through the severity of the measures which it was forced to adopt, to cause the United States to enter the conflict on either the one or the other side. The rights of neutrals were a serious interference with the free action of the belligerents, and they were subordinated to the purposes of the latter. Whether the one side or the other suffered the more abuse from attack is hard to decide; but it is certain, as will be pointed out, that all recognized and accepted rules of blockade, as at that time understood by either party, were flagrantly violated not only with re-

¹³ Am. State Papers, For. Rel. III, 325.

spect to belligerents but also with respect to neutrals. The decrees and orders in council were war measures, and, as such, the blow they were intended to deal the enemy must first brush aside the neutral if the latter's rights in any degree might act as a buffer to lessen its effect.

The Berlin decree, therefore, was a measure of retaliation against Fox's blockade. To this end, although the Emperor could not keep a single ship of war on the seas except as a fugitive from his omnipresent enemies, it declared the British Isles in a state of blockade.

In addition to this it proclaimed that:

4. All warehouses, merchandise or property of whatever kind belonging to a subject of England shall be regarded as a lawful prize.

5. Trade in English goods is prohibited, and all goods belonging to England or coming from her factories or her colonies are declared lawful prize.

7. No vessel coming directly from England or from the English colonies or which shall have visited these since the publication of the present decree shall be received in any port.

8. Any vessel contravening the above provision (7) by a false declaration shall be seized, and the vessel and cargo shall be confiscated as if it were English property.¹⁴

From the above extracts it is readily seen how far-reaching the provisions of this decree were. If they were to be literally applied, they would contravene all recognized rules of blockade even to a greater extent than was the case with the order in council that preceded them.

The last paragraph of the first section showed a desire on the part of Napoleon to compromise and lessen the severity of the order if the British would come to the French way of thinking. It reads:

The provisions of the present decree shall continue to be looked upon as embodying the fundamental principles of the Empire until England shall recognize that the law of war is one and the same on land and sea, and that the rights of war cannot be extended so as to include private property of any kind or the persons of individuals unconnected with the profession of arms, and that the right of blockade should be restricted to fortified places actually invested by sufficient forces.¹⁵

This decree for various reasons was not fully enforced by Napoleon; and for nine months it assumed more the form of a municipal law than

¹⁴ Anderson, *Constitutions and Documents, France* (Translated by James H. Robinson), 386-387.

¹⁵ *Ibid.*, 386.

of an international order. The manner of enforcement was, however, not inquired into by the British Government, which responded on January 10, 1807, with a second order in council proclaiming on penalty of capture and condemnation that it is

judged expedient to order that no vessel shall be permitted to trade from one port to another, both which ports shall belong to, or be in possession of France or her allies, or shall be so far under their control as that British vessels may not freely trade thereat; and that the commanders of His Majesty's ships of war and privateers have been instructed to warn every neutral vessel coming from any such port, and destined to another port, to discontinue her voyage, and not to proceed to any such port.¹⁶

This decree would have required actual direct notice to the vessel and was therefore probably within reasonable limits.

This order was followed on November 11, 1807, by a second and more severe order which decreed that France, her allies and colonies, were in state of blockade; made all goods of produce or manufacture of such territory subject to capture and condemnation, unless such trade in them be carried on through British ports; all vessels leaving blockaded ports were subject to capture unless they were destined for a British port; vessels which left port before the issuance of the order must have been notified of the blockade before being captured for violation of it; and vessels carrying French certificates of origin were subject to condemnation.¹⁷

It was held that these measures were justifiable because the neutral states acquiesced in the provisions of the French decree, which, however, seems not to have been the case. In a letter by Pinckney to Madison, November 23, 1807, we read:

The British orders annihilate the whole public law of Europe relative to maritime prize, and substitute a sweeping system of condemnation and penalty in its place. The French decree produces no such change at all in that law. The last was no more than a legitimate, though possibly an ungracious, exercise of the right of local sovereignty; while the former can be referred only to force, and look for the scene of their operation to the ocean.

¹⁶ Am. State Papers, For. Rel. III, 5.

¹⁷ *Ibid.*, 269-270.

Nor can it be shown that knowledge had in any form come to the United States Government of a strict enforcement of the Berlin decree before the issuance of the order in council of November 11th.

So long as the decree was enforced only as a local or municipal law, the United States did not remonstrate because it was not affected by the operation of the act. There was little exchange of notes between France and this country on this subject prior to November, 1807, when the more stringent enforcement went into effect. The position in which American vessels were placed by the contradictory and opposed decrees and orders was very unsatisfactory. They could not touch at France or her allies, and they could not touch at England, nor could they carry either French or British goods without subjecting themselves to capture.

Count Champagny asserted that from the French view the United States was at war with England from the time that the orders in council were issued. France was merely waiting to see whether the United States would declare hostilities or not before enforcing the Berlin decree in its liberal purport.¹⁸

The American Government protested strongly against the application of municipal laws against foreign nations on the high seas, and even showed astonishment at the act of France in her extraordinary declaration when she was without the slightest means of enforcing it.¹⁹ The Emperor's council itself was opposed to extending the execution of the decree, but Napoleon was determined through it to determine the position of the United States in her relations with Great Britain.²⁰

On December 17, 1807, Napoleon met the new British order in council with his famous Milan decree. This decreed that the British orders would have the effect of denationalizing the vessels of all nations of Europe, thus affecting the sovereignty of the states themselves; and

¹⁸ Am. State Papers, For. Rel. III, 250.

¹⁹ Madison to Armstrong, Feb. 8, 1808.

"That the execution of local laws against foreign nations on the high seas is a violation of the rights of the former and freedom of the latter, will probably not be questioned. A contrary principle would, in fact, imply the same exclusive dominion over the entire ocean as is enjoyed within the limits of the local sovereignty, and a degradation of every other nation from its common rights and equal rank." Am. State Papers, For. Rel. III, 249.

²⁰ Am. State Papers, For. Rel. III, 250.

that all vessels submitting to search or entering British ports become *ipso facto* denationalized and hence are English property; that such vessels are subject to capture as lawful prizes; that all vessels either going to or coming from English ports, colonies or any country in the possession of English troops are lawful prize; that the decree shall not apply to such countries as force England to respect their flags; and that the decree shall be *ipso facto* abrogated and void so soon as the English Government shall abide by the principles of the law of nations.²¹

The enforcement of these blockades seems to have been something just short of legalized piracy. Napoleon could keep but few scattered cruisers and privateers on the seas, with which he now began to prey upon American trade. England's whole navy, large as it was, was notoriously inadequate to maintain a blockade of the European Continent and the French colonial possessions. Seizures by both sides were numerous, and it is small wonder that the United States Government changed from official protest to active measures of defense. The counter-strokes of the belligerents became more destructive to neutrals than to the belligerents. The United States Government sought to protect its commerce against such unlawful spoliation. The reckless Yankee skipper began to trump up various excuses for blockade running, among which some of the most prominent in the British admiralty reports are the "distress of the vessel," "exhausted crews" and "entered to procure a pilot."

The United States Government unofficially ordered American vessels not to speak to British cruisers, but rather to run, upon which Sir William Scott of the British High Court of Admiralty remarked,

If these directions are to be taken in their full extent, as authorizing the masters of American ships to fly from British cruisers, it is a practice which, I venture to say, will be attended with very great inconvenience to American navigation. It must be understood that every commissioned cruiser has an undoubted right of inquiry, and it is not the arbitrary decrees of other belligerents that can abrogate it. On strict principle, to defeat that right by evasion might be as penal as to resist it by force, though it has not been held so in practice.²²

²¹ Anderson, *Constitutions and Documents*, France, 303-304.

²² The *Mentor*, Edwards' Admiralty Reports, 208. See also the *Arthur*, *Ibid.*, 203, and the *Elizabeth*, *Ibid.*, 198, all decided in 1810.

The reason for these evasions and subterfuges becomes apparent when it is understood that the admiralty court held that, in case a vessel is forced to break blockade out of necessity, such, for instance, as need of repair or stress of weather, and does not deliver its cargo, it is not subject to capture.²³

In the case of the *James Cook* the court held that it has been determined over and over again that a ship is not at liberty to go up to the mouth of a blockaded port even to make inquiry; that in itself is a consummation of the offense, and amounts to an actual breach of blockade.²⁴

On December 21, 1807, Congress passed the Embargo Act prohibiting the sailing of any vessel from any port of the United States to any foreign port, except foreign armed public ships and foreign merchant vessels in ballast.

On January 8, 1808, a supplementary act was passed requiring coasting and fishing vessels to give bonds to re-land their cargoes in the United States, and still later (March 13th) the provisions of the act were so extended as to include all vessels whether of the size required for registration or smaller.

As a result of the embargo, Napoleon on April 17, 1808, issued his Bayonne decree directing the confiscation of all American vessels in French ports, or which should arrive in them, reasoning that no American vessel could be on the ocean under the embargo, and that therefore those that pretended to be American were in reality British.²⁵ There was some foundation for his assertion, because the American vessels which evaded the embargo did so often through the use of fraudulent British papers and registers.

The embargo becoming very unpopular with the American people, it was repealed, and in its place was substituted the Non-Intercourse Act, March 15, 1809. This act prohibited all commercial intercourse with Great Britain and France.

This was closely followed (April 26, 1809) by a British order in council

²³ The *Charlotta*, June 20, 1810, Edwards' Admiralty Reports, 252.

²⁴ The *James Cook*, July 3, 1810, *Ibid.*, 264.

²⁵ Am. State Papers, For. Rel. III, 291.

revoking the orders of the 11th of November, 1807, but declaring in their place a blockade of the ports of Holland, France and Italy.²⁶

Napoleon now seemed to suffer one of his peculiar changes of front, and in June, 1809, he decreed that inasmuch as the United States had obtained the revocation of the British orders in council of November, 1807, the Milan decree should be withdrawn. In August, however, the Emperor, through another change of policy, issued a secret decree providing for the confiscation of any American ship that should enter the ports of Spain, France or Italy, and to these Holland was shortly added.²⁷

Macon's Bill No. 2 repealed the Non-Intercourse Act and authorized the President to prohibit commerce with either one of the belligerents who should not recede from its policy of war on neutrals before March 3, 1810.²⁸ This re-established freedom of commerce until one or the other of the belligerent states should withdraw its orders or decrees.

Or March 23, 1810, Napoleon issued his Rambouillet decree, as a remonstrance against the acts of the United States, in which he provided:²⁹

1. That all vessels navigating under the flag of the United States, or possessed in whole or in part by any citizen or subject of that Power, which, dating from May 20, 1809, may have entered or shall enter into the ports of our Empire, our colonies or the countries occupied by our armies, shall be seized, and the products of the sales shall be deposited in the surplus fund.

Vessels charged with dispatches were exempted.

Upon knowledge of this decree, the United States was almost ready to go to war with France; and it was probably the knowledge of lack of preparation which restrained the government from taking the step. The policy pursued by France up to this time was now found to injure that country more than it benefited her, and in August, 1810, Napoleon instructed his Foreign Minister, the Duc de Cadore, to notify the American Minister, General Armstrong, that after November 1, 1810, the Berlin and Milan decrees would cease to operate as far as the United

²⁶ Anderson, *Constitutions and Documents, France*, 394-6.

²⁷ E. Channing, *The American Nation*, Vol. 12, p. 243.

²⁸ *Ibid.*, 245.

²⁹ Anderson, *Constitutions and Documents, France*, 396-397.

States was concerned.³⁰ On the same day, however, Napoleon ordered that all American vessels which had arrived at French ports between May 20, 1809, and May 1, 1810, should be confiscated, and that no American ship arriving in a French port before November 1st, should be permitted to discharge its cargo without a license.³¹

Under the provisions of the Duc de Cadore's letter one case, that of the *New Orleans Packet*, was decided in favor of the United States, and this was now used in an attempt to have the British orders in council repealed. But obtaining no satisfaction from this source, Madison, who took the Duc's letter to mean what it said, on November 2, 1810, issued a proclamation cutting off all commercial intercourse with Great Britain.³²

The British took the view that a decree officially instituted must be also officially revoked, and that the Duc de Cadore's letter was not such official revocation of the French decrees.³³ They held also that the British orders would not expire of themselves on the revocation of the French decrees, but were dependant upon special repeal of the government. The authenticity of the Duc's letter was at the time questioned by the British High Court of Admiralty in the case of the *Snipe and Others*.³⁴

In the case of the *Fox*³⁵ Justice Scott held that the British orders were just, so long as they were retaliatory, but that as soon as they ceased to be retaliatory, they ceased to be just; that, although a state

³⁰ Letter of the Duc de Cadore. August 5, 1810. Edwards' Admiralty Reports. App., Part I, xxi. "I am authorized to declare that the Berlin and Milan decrees are revoked, and will cease to have their effect from the 1st of November: It being well understood that the English shall revoke their orders in council, and renounce their new principles of blockade, or that the United States will cause their rights to be respected by the English."

³¹ Channing, *The American Nation*, 249.

³² *Ibid.*, 250.

³³ "The declaration of the person styling himself Duc de Cadore, imports no revocation; for that declaration imports only a conditional retraction, and this upon conditions known to be impossible to be complied with. It has been urged that the American Government has considered it otherwise, and has so declared it for the regulation of the conduct of the people of that country." *The Fox and Others*, Edwards' Adm. Reports, 316, decided May 11, 1811.

³⁴ Edwards' Adm. Reports, 383-395.

³⁵ Am. St. Papers, For. Rel. III, 418 *et seq.*

is never at liberty to apply a rule harsher than that of the law of nations unless through a just provocation as a retaliatory measure, it is the duty of the court to carry out the measure and it is the duty of the state to decide when the provocation ceases. As a result of this decision, 28 vessels, valued at \$254,300, with cargoes valued at \$515,500, were declared confiscated by the British prize courts between June 18, 1811, and July 5, 1811, which probably more than any other circumstance made the breach between the United States and Great Britain irreparable.

On the 28th of April 1811, Napoleon officially revoked the Berlin and Milan decrees in consideration of the fact that the Congress of the United States had on the 2nd of March of the same year ordered the execution of the Non-Intercourse Act against Great Britain which had been proclaimed November 2, 1810, by President Madison, but the operation of which had been postponed.³⁶

This was submitted to Lord Castlereagh by Mr. Russell in proof of the revocation of the French decrees on May 20, 1812, in an endeavor to have the British orders repealed; but it was not until June 23, 1812, that the orders of January, 1807, and April, 1809, were definitely revoked. The repeal, however, came too late, for on June 18, 1812, Congress had declared war upon Great Britain.

III. FINAL SETTLEMENTS

During the negotiations for peace carried on by the American diplomatic representatives at Ghent in 1814, the question of blockades was submitted to the British plenipotentiaries in a project of a treaty of peace (Nov. 10, 1814). This, however, is as far as the matter was carried, as it was declared inadmissible by the British delegates. The provisions contained in this proposed article were, that notification must be made directly to the vessel, and that confiscation should be allowable only upon an attempt to enter the blockaded port after such notification. The proposed definition of blockade was that of the Russian treaty of 1801.

In order to determine what characterizes a blockaded port, that denomination is given only to a port where there is, by the deposition of

³⁶ Am. St. Papers, For Rel. III, 432.

the Power which attacks it with ships stationary or sufficiently near, an evident danger in entering.³⁷

In the final treaty of peace of December 24, 1814, the subject did not even receive mention.

The losses suffered by American merchants through the operation of Napoleon's decrees were kept alive through diplomatic channels under the name of French Spoliation Claims, which were finally settled by the treaty of July 4, 1831. In November, 1816, Albert Gallatin brought the subject before the Duke de Richelieu, but the French Government was compelled in an unofficial way to reject the claims, because of financial and other embarrassment, but it considered this to be in no way an official answer.³⁸ Subsequent to this the claims were repeatedly admitted by the Duke de Richelieu, Vicount de Montmorency, M. de Villele and Count de le Ferronnays. But the French public officials tried continually to weaken them.³⁹

Van Buren held

That the present Government of France is, by the established principles of public law, responsible for those acts, is not, at this day, an open question among civilized nations. The consequences of an opposite doctrine would strike at the root of all confidence in the dealings between different nations.⁴⁰

Rives, who negotiated the treaty for the United States, expressed the American point of view when he said:

The Berlin and Milan decrees being gross violations of the public law and faith of treaties [having special reference to the provisions of Articles XII to XXVI of the treaty of September 30, 1800,] are such acts as no sovereign can rightfully perform, and must, therefore, be regarded as null and void.⁴¹

The matter was left to a French commission, which allowed the claims of the United States in the following cases:

1. Sequestration where the property had not been definitely condemned by the Council of Prizes.

³⁷ Am. State Papers, For. Rel. III, 739.

³⁸ Ex. Doc. 147, Vol. 3, p. 51. 22d Cong., 2nd sess., 1832-33.

³⁹ *Ibid.*, p. 20.

⁴⁰ *Ibid.*, p. 23.

⁴¹ *Ibid.*, p. 76.

2. Where the vessels were destroyed at sea.

3. Where condemnations which purported to be made by virtue of the Berlin and Milan decrees, in being definitely repealed, were, according to the French Government, to be thenceforth considered as not having existed.

4. For all supplies derived from citizens of the United States for debts otherwise due.

5. Where the sentences of condemnation gave a retrospective effect to the decrees under which they purported to be made.⁴²

The payment by France to the United States of the sum of \$5,000,000 in settlement of all the claims as above given settled beyond dispute the illegality of at least certain applications of the French decrees; but, in addition to this, they established their own illegality by outlining as a preface and justification of their being the generally accepted principles of blockade as at that time understood by nations.

ARCHIBALD H. STOCKDER.

⁴² Ex. Doc. 147, Vol. 3, p. 51. 22d Cong., 2nd sess., 1832-33.